IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 24, 2006 at Knoxville

STATE OF TENNESSEE v. ANTONIO D. RICHARDSON

Appeal from the Criminal Court for Davidson County
No. 2003-B-1458 Steve Dozier, Judge

No. M2005-01161-CCA-R3-CD - Filed May 4, 2006

A Davidson County Criminal Court jury convicted the defendant, Antonio D. Richardson, of three counts of especially aggravated kidnapping, one count of aggravated assault, one count of felony reckless endangerment, and one count of burglary, all stemming from an unsuccessful attempt on January 12, 2003, to rob a Calhoun's restaurant in the Rivergate area of Davidson County. Additionally, the defendant pleaded guilty to attempted especially aggravated robbery. The trial court imposed an effective Department of Correction (DOC) sentence of 67 years. Now on appeal, the defendant claims (1) that the convictions of especially aggravated kidnapping are prohibited by, on due process grounds, the conviction of attempt to commit especially aggravated robbery and (2) that the trial court erred in sentencing. Following our review, we reverse the convictions of especially aggravated kidnapping and order the charges on these counts dismissed. Otherwise, we affirm the convictions, although we remand for re-sentencing.

Tenn. R. App. P. 3; Judgments of the Criminal Court are Reversed in Part and Affirmed in Part, Remanded.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JOSEPH M. TIPTON, J., joined.

Ross E. Alderman, District Public Defender; and Emma Rae Tennet, J. Michael Engle, and Graham Prichard, Assistant District Public Defenders, for the Appellee, Antonio D. Richardson.

Paul G. Summers, Attorney General & Reporter; C. Daniel Lins, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Pamela Sue Anderson, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

.

In summary, the evidence presented at trial showed that the defendant, who worked for Calhoun's as a cook, was not on duty at the restaurant on the night of January 12, 2003, when he lingered about the restaurant until closing at 11:00 p.m. The jury apparently inferred from the

testimony of other employees that the defendant, wearing a leather jacket, ski mask, and latex gloves and carrying a pistol, emerged from the employees' restroom after closing. He then took co-manager Allison Howell upstairs at gunpoint, struck her in the head with the gun, and forced her to lie on a stock room floor.[1] The defendant then knocked on the door to the office, where co-manager Johnnie Linn Lucas had just deposited the evening's receipts in the office safe.

Ms. Lucas opened the door, and the defendant pushed her to the floor in the small office and ordered her to open the safe. Ms. Lucas testified that the safe was difficult to open even when the correct combination was used and that due to the stress caused by the armed robber, she was unable to open the safe. The defendant struck Ms. Lucas in the head a number of times and also struck her hand, apparently using the gun as a club. During this time another robber, an individual smaller than the defendant, bound the recumbent Ms. Howell's hands behind her with tape. Ms. Lucas testified that this second robber came into the office, and after the men had learned the safe's combination from Ms. Lucas and Ms. Howell, the defendant dragged Ms. Lucas into the stock room, where he hit her in the eye, before taking her into the fan room, where he commanded her to stay. Eventually, Ms. Lucas decided to leave the fan room. She found Ms. Howell on the stock room floor, and the two of them went into the vacated office, closed the locked door behind them, and called for assistance.

The defendant and his accomplice were apparently unable to open the safe and fled the premises without obtaining money.

Both female victims testified that the voice of the larger robber was that of the defendant, although Ms. Howell originally opined in a pretrial statement that the voice was that of another kitchen employee. Nevertheless, when the responding police officers searched the grounds at Calhoun's, they found the defendant, wearing a leather jacket and hiding behind an ornamental shrub near an exterior wall of the restaurant. Nearby, they found a ski mask, a latex glove that appeared to be blood-stained, and a pistol, from which the grips were missing. In the manager's office, the police found three pieces of pistol grip lying in the floor.

In a pretrial statement, the defendant admitted that he had attempted to rob the restaurant. He claimed that he was assisted by a man named "Juan," but the police were unable to locate anyone to charge as the accomplice to the crimes. The defendant did not testify at trial and called no witnesses.

The scheme of the charges and the resulting convictions is as follows:

Count	Charge	Victim	Sentence
(1)	Especially aggravated	Lucas	25 years

[1] The stairway led into a stock room area. From this area a locked door provided access to a small office. On the opposite side of the stock room, an unlocked door provided access to the "fan room," a utility space that accommodated the ventilation of kitchen vapors through the roof.

	kidnapping (EAK) via deadly weapon		
(2)	EAK via serious bodily indury	Lucas	25 years
(3)	EAK via deadly weapon	Howell	23 years
(4)	Attempt to commit especially aggravated robbery	Lucas	10 years
(5)	Reckless Endangerment	Alan Evans (Calhoun's employee)	2 years
(6)	Aggravated assault	Tim Ayers (Calhoun's employee)	5 years
(7)	Burglary	Calhoun's	4 years[2]

As is pertinent to the present case, especially aggravated kidnapping is committed by one who falsely imprisons another, *see* Tenn. Code Ann. § 39-13-302 (2003), accomplishing the act, for purposes of counts (1) and (3), "with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon," *id.* § 39-13-305(a)(1), or, for purposes of count (2), "[w]here the victim suffers serious bodily injury," *id.* § 39-13-305(a)(4). Especially aggravated robbery is "robbery as defined in [Tennessee Code Annotated section] 39-13-401," accomplished with a deadly weapon and when the victim suffers serious bodily injury. *Id.* § 39-13-403(a)(1) & (2).

I. Due Process Violation

The defendant's first appellate issue is that principles of due process prohibit the convictions of especially aggravated kidnapping in the face of the conviction of attempt to commit especially aggravated robbery.

In *State v. Anthony*, 817 S.W.2d 299 (Tenn. 1991), our supreme court addressed the issue of "the propriety of a kidnapping conviction where detention of the victim is merely incidental to the commission of another felony, such as robbery or rape." *Id.* at 300. The court reasoned that a double jeopardy analysis was inadequate for resolving this issue and turned instead to due process

[2]The aggravated assaults of Mr. Evans and Mr. Ayers occurred when the robbers pointed their pistols at these victims. The trial court merged the conviction in count (2) into the conviction in count (1). Prior to the jury trial, the defendant pleaded guilty to attempted especially aggravated robbery, the offense charged in count four.

principles. *See id.* at 306. The court ruled that the constitutional validity of a separate kidnapping conviction in such cases is determined by "whether the confinement, movement, or detention is essentially incidental to the accompanying felony and is not, therefore, sufficient to support a separate conviction for kidnapping, or whether it is significant enough, in and of itself, to warrant independent prosecution and is, therefore, sufficient to support such a conviction." *Id.* It also commented that "one method of resolving this question is to ask whether the defendant's conduct 'substantially increased [the] risk of harm over and above that necessarily present in the [associated] crime . . . itself.'" *Id.* (quoting *State v. Rollins*, 605 S.W.2d 828, 830 (Tenn. Crim. App.1980)). In making its determination, the *Anthony* court observed that "although every robbery, by definition, involves some detention against the will of the victim, if only long enough to take goods or money from the person of the victim, the legislature did not intend that necessarily every robbery should also constitute a kidnapping." *Id.*

In *State v. Dixon*, 957 S.W.2d 532 (Tenn. 1997), our supreme court clarified the *Anthony* ruling by stating,

> The *Anthony* decision should only prevent the injustice which would occur if a defendant could be convicted of kidnapping where the only restraint utilized was that necessary to complete the act of rape or robbery. Accordingly, any restraint in addition to that which is necessary to consummate rape or robbery may support a separate conviction for kidnapping.

Id. at 534-35. The court commented that kidnapping is indicated by the defendant's purpose in removing or confining the victim, "not the distance [of the removal] or duration [of the confinement]." *Id.* at 535. To fathom the propriety of separate convictions of kidnapping, on the one hand, and robbery or rape, on the other hand, the court first inquires "whether the movement or confinement was beyond that necessary to consummate [the associated felony]." *Id.* If that question is answered affirmatively, "the next inquiry is whether the additional movement or confinement: (1) prevented the victim from summoning help; (2) lessened the defendant's risk of detection; or (3) created a significant danger or increased the victim's risk of harm." *Id.* If both prongs are satisfied, then the dual convictions do not violate due process. *Id.*

(a) Whether the movement or confinement of the victims exceeded that necessary to consummate the robbery in progress

Applying the *Anthony-Dixon* regimen, our first task is to determine whether the movement and confinement of each victim in the present case was beyond that necessary to consummate the robbery in progress. For reasons discussed below and based upon the facts in evidence, we are unable to conclude that the removal or confinement of either victim exceeded that necessary to consummate the robbery in progress. *See Dixon*, 957 S.W.2d at 535.

(1) Ms. Howell

Regarding the adjudicated kidnapping of Ms. Howell, the evidence showed that when the defendant emerged from the restroom, he put the pistol to Ms. Howell's head and forced her to accompany him upstairs. As an employee of Calhoun's, the defendant knew that Ms. Howell was a co-manager on duty and likely knew that she had keys to the office and knowledge of the combination to the safe. The defendant struck Ms. Howell in the head, causing a wound that required two staples to close. The defendant left Ms. Howell prone in the stock room floor. Although the defendant's accomplice taped Ms. Howell's hands behind her back, she was later able to remove the tape and free her hands.

In *Anthony*, the robbers of a Shoney's restaurant accosted three Shoney's employees at a trash bin outside the restaurant after closing. *Anthony*, 817 S.W.2d at 301. These employees were held in place at gunpoint while one robber entered the restaurant and forced the manager and a waitress to accompany him at gunpoint to the office. *Id.* The defendant ordered the waitress to remain in the office and took the manager to the cash register. *Id.* After obtaining money from the safe near the cash register, the defendant encountered another employee, who was leaving the restroom. *Id.* The defendant "'stuck'" his gun in this employee's face and ordered him to return to and remain in the restroom. *Id.*

The *Anthony* court held that the defendant's convictions of aggravated kidnapping of the restaurant's manager and five employees were invalid in the face of his conviction of the robbery of the manager. *Id.* at 307. In arriving at this conclusion, our supreme court commented,

> Clearly, the restaurant manager . . . was not kidnapped. Although there was some interference with [the manager's] liberty when he was forced at gunpoint to open the safe, his movements in this regard were essentially incidental to the robbery. Indeed, they were part and parcel of that offense.

Id.[3]

In *State v. Sanders*, 842 S.W.2d 257 (Tenn. Crim. App. 1992), this court reversed Sanders' conviction of aggravated kidnapping that had been based upon his using a gun to force the victim, a manager of an Applebee's restaurant, to re-enter the restaurant after the victim had locked the doors for the night. *Id.* at 258. Inside the restaurant office, the robber forced the victim to open the safe. *Id.* The robber then bound the victim's hands with duct tape. *Id.* This court said that, although binding the victim's hands and leaving him inside the building "may have increased the [victim's] risk of harm," such a risk was not "substantially greater than that necessarily involved in the robbery." *Id.* at 260. "For these reasons," the court said, "the defendant's conviction[] [of] aggravated kidnapping must be reversed . . . ." *Id.*

[3]The *Anthony* court then determined that the other aggravated kidnapping convictions based on detaining the other five Shoney's employees were similarly invalid. *Id.*

We are unable to distinguish the plight of Ms. Howell from that of the restaurant manager-victims in *Anthony* and *Sanders*. Like them, she was apparently targeted because, as a manger, she had the means to enter the restaurant's till, and like them, she was essentially forced at gunpoint to accompany the robber to the till. After she moved upstairs to the proximity of the office, her confinement there was incidental to the robbery in progress, according to the rule of *Anthony* and *Sanders*.

We have considered whether the blow to Ms. Howell's head alters the otherwise mandated view that her movement and confinement were incidental to the robbery. To consider the effect of Ms. Howell's injury upon a due process analysis, we have focused upon three legal facets of the case. First, we know that for principles of due process to prohibit dual convictions per *Anthony*, the victim in a kidnapping conviction need not have been the victim of the primary or associated felony. *See generally Anthony*. Second, we note that Ms. Howell's injury apparently did not qualify as a serious bodily injury, *see State v. Zonge*, 973 S.W.2d 250 255 (Tenn. Crim. App. 1997), and furthermore the especially aggravated kidnapping of her as alleged in count (3) of the indictment was based upon the deadly weapon, not the serious bodily injury mode of especially aggravated kidnapping, *see* Tenn. Code Ann. § 39-13-305(a)(1) & (4) (2003). Last, and we think most importantly, we discern that the *Anthony* court focused upon the kidnapping elements of removal and confinement as the dynamics that cause due process mischief. *See Anthony*, 817 S.W.2d at 302-06. Removal and confinement are elements of false imprisonment, a misdemeanor that is the root crime of kidnapping, *see* Tenn. Code Ann. § 39-13-302(a) (2003); each grade of kidnapping incorporates the elements of false imprisonment, *see id.* §§ 39-13-303, -304, & -305. Essentially, due process prohibits the kidnapping conviction in addition to the conviction on the associated felony when *false imprisonment* is incidental to the commission of the associated felony as a basis for any grade of kidnapping. Thus, the due process problem with kidnapping as a part of a tandem of convictions occurs at the most fundamental level and exists regardless of the presence of factors such as bodily injury and the use of a deadly weapon, which merely shift the root offense into higher grades. In this context, therefore, we do not distinguish the present case from *Anthony* and *Sanders* on the ground that Ms. Howell was injured during confinement.

(2) Ms. Lucas

Regarding the adjudicated kidnapping of Ms. Lucas, the evidence showed that, once the defendant and his accomplice learned the combination to the safe, the defendant removed Ms. Lucas from the office. Ms. Lucas testified that the office was very small, affording only enough room for two people to be seated. We infer that the defendant removed Ms. Lucas to afford space for him and his accomplice to work on the safe. Once entering the stock room, where the bound Ms. Howell was lying, the defendant struck the unbound Ms. Lucas, placed her inside the unlocked fan room, and ordered her to remain there. Apparently, the defendant's accomplice attempted to open the safe during the removal of Ms. Lucas, and Ms. Lucas remained inside the fan room long enough for the defendant to assist in attempting to open the safe. Assuming that the robbers needed to remove Ms. Lucas from the office to provide working space, the consummation of the robbery logically required that she not be left with unrestricted access to the exit. The robbers had left Ms.

Howell bound with tape in the open stock room, and apparently the defendant opted to place Ms. Lucas in the fan room rather than bind her. In reality, of course, only the victims' fear of the robbers restrained them in place; neither victim was prohibited by an insurmountable physical restraint from leaving the building.

As stated by our supreme court in *State v. Martin*, the case consolidated with *Anthony* on appeal, movement of a victim a "short distance[] within the general area . . . is normal in the course of a robbery." *Anthony*, 817 S.W.3d at 306-07 (holding that Martin's actions in robbing the office-worker victims at gunpoint, followed by his forcing them down a hallway and into a restroom, could "not support convictions [of] both robbery and kidnapping"). *Id.* at 306-07. In the present case, Ms. Lucas was moved a short distance within the general area as a means of facilitating the robbery.

Even if the defendant and his accomplice left Calhoun's immediately after the defendant put Ms. Lucas in the fan room, restraint "for the purpose of facilitating . . . escape [following a robbery is] essentially incident to the robbery." *State v. Coleman*, 865 S.W.2d 455, 457 (Tenn. 1993) (holding that Coleman's moving the store clerk from store's main room to a side room during robbery and before raping the victim in the side room did not justify any kidnapping conviction in addition to convictions of robbery and rape); *see Dixon*, 957 S.W.2d at 535 (distinguishing *Coleman*); *State v. Fuller*, 172 S.W.3d 533, 537 (Tenn. 2005) ("The analysis set forth in *Dixon* . . . provides the structure necessary for applying the principles announced in *Anthony*.").

Consistent with our earlier conclusion that victim Howell's injury occasioned no difference in applying *Anthony* principles, we likewise conclude that the injuries to Ms. Lucas, though grievous, do not signify that her removal or confinement exceeded the bounds necessary to commit robbery. To be sure, separate counts of the indictment charged the defendant with the especially aggravated kidnapping of Ms. Lucas via (1) use of a deadly weapon and (2) the infliction of serious bodily injury. Furthermore, Ms. Lucas' loss of an eye, without more, establishes her bodily injury as serious. On the other hand, her serious bodily injury served as a basis for upgrading the robbery attempt to an attempt to commit especially aggravated robbery, *see* Tenn. Code Ann. § 39-13-403(a) (2003) (proscribing as especially aggravated a robbery accomplished with a deadly weapon *and* when the victim suffers serious bodily injury), and in any event, as pointed out above, *Anthony* asks only whether the removal or confinement elements of false imprisonment or any grade of kidnapping are merely incidental to the associated felony. In the present case they are, and accordingly, the first prong of the *Anthony* analysis as elucidated in *Dixon* is complete without respect to whether the victim sustained bodily injury, serious or otherwise.

The conclusion is that the movements and confinements of both Ms. Howell and Ms. Lucas were incidental to the commission of the robbery in progress.

Before moving to the second analytical prong itemized in *Dixon*, we pause to reveal that we considered whether it is *Anthony*-significant that the associated felony in the present case is only an attempt. The robbery that was in progress during the restraints of the victims was never

consummated. We know that an attempt of the nature portrayed in the present case occurs when the actor makes a "substantial step toward the commission of the offense" but fails to complete the course of action or cause a result that would constitute the primary offense. *See id.* § 39-12-101(a)(3) (2003). One could argue that no false imprisonment or kidnapping is *necessary* to merely taking a substantial step toward robbery. This court, nevertheless, has applied the principles of *Anthony* in cases in which the associated felony was an attempt. *See State v. Taylor*, 63 S.W.3d 400, 410 (Tenn. Crim. App. 2001) (holding aggravated kidnapping "incidental" to the offense of attempted rape); *State v. Binion*, 947 S.W.2d 867, 872-73 (Tenn. Crim. App. 1996) (trial court's dismissal of defendant's conviction for especially aggravated kidnapping affirmed when defendant was also convicted of attempted aggravated rape). Although no comments appear in these decisions about the *attempt* nature of the associated felony conviction, we can appreciate the logic of *Anthony* being applied in such a situation. As our supreme court mentioned in *Coleman*, the *Anthony* analysis looks to the "primary offense" and the "purpose" of the abduction. *Coleman*, 865 S.W.2d at 457; *see Dixon*, 957 S.W.2d at 535 (emphasizing the purpose of the removal or confinement); *Binion*, 947 S.W.2d at 873 ("The appellant's intention on the day in question was to rape the victim," despite that the ultimate conviction was for attempt to commit aggravated rape.). In the present case, the defendant intended to rob money from Calhoun's restuarant; robbery was his primary purpose, although he abandoned the attempt after he had moved and confined the victims. We focus upon the intended robbery, not whether the intended result was fulfilled. To do otherwise would produce absurd results: A robber who fails to complete the robbery could suffer the penalty of some form of kidnapping conviction in addition to a conviction for an attempt to rob, but a robber who completes the robbery and gets away with the money could enjoy the protection afforded by *Anthony*. We conclude that the defendant's failure to bring his robbery to fruition has no bearing on the *Anthony* analysis.

(b) Whether the movement or confinement prevented the victims from summoning help, lessened the risk of detection, or created a significant danger or risk of harm

The determination that the movement and confinement of the victims did not exceed that necessary to accomplish the primary purpose of robbery equates, by itself, to a determination that dual convictions violate principles of due process. *See Dixon*, 957 S.W.2d at 535. Nevertheless, to facilitate possible appellate review by our supreme court, we now embark upon the second prong of the *Anthony* analysis itemized in *Dixon*: whether the restraint (1) prevented the victims from summoning help, (2) lessened the defendant's risk of detection, or (3) created a significant danger or increased the victim's risk of harm. *See id.*

(1) Prevention of summons for help

The defendant moved Ms. Howell from the main floor, up the stairs, to a stock room on the second floor at the head of the stairs. He moved Ms. Lucas from one partitioned space on the second floor to another partitioned space on the same floor. Both rooms opened into the stock room. Although Ms. Lucas had been threatened and severely beaten, she was placed unbound in an unlocked room and left unattended. Ms. Howell's hands were taped behind her back, but she was

left in the stock room, which provided unimpeded physical access to the stairs. The physical circumstances of the respective confinements did not prevent either victim from leaving the building and summoning help. Ultimately, Ms. Lucas merely walked out of the fan room and collected Ms. Howell, who removed the tape from her hands, and the two women walked into the vacated office to call 9-1-1. We conclude that the restraints of the victims did not prevent them from summoning help.

(2) Risk of detection

Similarly, we cannot see how the victims' restraints *lessened* the risk of detection. Ms. Howell was abducted in the presence of other employees of the restaurant who were apparently left unattended. The situs of the robbery was necessarily upstairs, where the safe was located. Ms. Howell and Ms. Lucas were never removed from that general area. Furthermore, leaving the women mobile and unattended while the robbers tried to open the safe hardly lessened the robbers' risk of detection. Even the binding of Ms. Howell's hands can hardly be seen as lessening the risk of detection when the robbers left other employees free to leave the premises.

(3) Danger or risk of harm

The evidence does support a conclusion that the removal or confinement of Ms. Lucas created a significant danger or risk of harm to her. Although she was ambulatory and left unbound in a room from which she could, and ultimately did, simply walk to freedom, she was seriously injured and had bled profusely. We discern that leaving her bleeding and with diminished dexterity and eyesight in a dark room cluttered with equipment increased her *risk* of harm.

Ms. Howell was not injured as seriously as Ms. Lucas, and Ms. Howell was not confined in a darkened room full of equipment. We do not perceive that the robbers increased her peril by leaving her prone with her hands temporarily restrained . *Cf. Fuller*, 172 S.W.3d at 538 (binding robbery victim increased risk of harm when the robbers' purpose was not merely escape but to leave the victim's apartment and then return).

(c) Due Process Summary; Remedy

In summary, principles of due process forbid dual convictions of especially aggravated kidnapping and attempt to commit especially aggravated robbery.

We now turn to the remedy. The question of the hour is: Which rubric of convictions survives the application of due process principles, the Class A felony convictions of especially aggravated kidnapping, *see* Tenn. Code Ann. § 39-13-305(b)(1) (2003) (establishing especially aggravated kidnapping as a Class A offense), or the Class B felony conviction of attempt to commit especially aggravated robbery, *see id.* §§ 39-13- 402(b) (establishing especially aggravated robbery as a Class A offense), & 39-12-107(a) ("Criminal attempt is an offense one (1) classification lower than the most serious crime attempted . . . .")? Had the prohibition of dual convictions been

grounded in double jeopardy principles, the remedy would be to simply merge the convictions, with the result that the most serious rubric of convictions would emerge and survive. *See, e.g.*, *State v. Davidson*, 121 S.W.3d 600, 636 n.4 (Tenn. 2003). Thus, had the present defendant's two rubrics of convictions violated double jeopardy principles, not only would the especially aggravated kidnapping rubric survive, but also *two* convictions of that offense–one from the double-jeopardy-mandated merger of counts (1) and (2) (victim Lucas) and one from count (3) (victim Howell)–would have survived. In double jeopardy analysis, offending convictions need not be vacated, and the underlying charges need not be dismissed.

Such has not been the case when due process violations have been adjudicated pursuant to *Anthony*. "In cases decided under *Anthony*, the kidnapping conviction, when involved, *is the conviction that has been dismissed*." *Taylor*, 63 S.W.3d at 410 (emphasis added) (citing *State v. Carson*, 950 S.W.2d 951, 953 n.3 (Tenn. 1997); *State v. Denton*, 938 S.W.2d 373, 378 (Tenn. 1996); *Coleman*, 865 S.W.2d at 457; *State v. Binion*, 947 S.W.2d 867, 872-73 (Tenn. Crim. App. 1996); *State v. Gregory*, 862 S.W.2d 574, 579 (Tenn. Crim. App. 1993)). Thus, we are constrained to reverse and vacate the three especially aggravated kidnapping convictions and to dismiss the charges in counts (1), (2), and (3), despite that, had the count for attempt to commit especially aggravated robbery not been prosecuted, two convictions – one from the merger of counts (1) and (2) and one from count (3) – of especially aggravated kidnapping apparently would have been sustainable.

II. Sentencing

In the defendant's second issue, he challenges the propriety of the trial court's determinations to impose lengthy and consecutive sentences. Specifically, the defendant complains that he received enhanced or maximum sentences on each of seven counts and that the court erred in amassing the separate sentences into an effective sentence in excess of 60 years.[4]

When there is a challenge to the manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (2003). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id.* If appellate review, however, reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

---

[4] Confusion abounds among the parties and the trial court whether the consecutive sentencing computation yields an effective sentence of 63, 64, or 67 years. Because of this court's reversal of the especially aggravated kidnapping convictions, we need not solve the arithmetic problem.

The mechanics of arriving at an appropriate sentence are spelled out in the Criminal Sentencing Reform Act of 1989. The court is required to consider (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210(a), (b), -35-103(5) (2003).

Especially aggravated kidnapping is a Class A felony. *See id.* § 39-13-305(b)(1) (2003). For Range I offenders, sentences for Class A felonies range from 15 to 25 years. *Id.* § 40-35-112(1). Attempt to commit especially aggravated robbery is a Class B felony. *See id.* §§ 39-13-403(b) & 39-12-107(a). For Range I offenders, sentences for Class B felonies range from eight to 12 years. *See id.* § 40-35-112(2). Reckless endangerment via a deadly weapon is a Class E felony, *see id.* § 39-13-103(b), for which the punishable range in Range I is one to two years, *see id.* § 40-35-112(5). Aggravated assault is a Class C felony, *see id.* § 39-13-102(d)(1), for which the punishable range in Range I is three to six years, *see id.* § 40-35-112(3). Burglary is a Class D felony, *see id.* § 39-14-402(c), for which the punishable range in Range I is two to four years, *see id.* § 40-35-112(4). Thus, the defendant's applicable ranges and imposed sentences are as follows:

Count	Charge	Range	Sentence
(1)	EAK	15 to 25 years	25 years
(2)	EAK	Merged with count (1)	
(3)	EAK	15 to 25 years	23 years
(4)	Attempt to commit especially aggravated robbery	8 to 12 years	10 years
(5)	Reckless endangerment with deadly weapon	1 to 2 years	2 years
(6)	Aggravated assault	3 to 6 years	5 years
(7)	Burglary	2 to 4 years	4 years.

In the sentencing hearing, Ms. Lucas testified that she underwent more than 10 surgeries following the injuries to her lost eye and nearly amputated finger. She experienced difficulty in being fitted with a prosthetic eye, and despite surgeries and eight months of physical

therapy, she never regained use of her finger. She and her family had to undergo counseling to cope with the events of January 12, 2003.

Also in the sentencing hearing, the trial court admitted the presentence report, which showed that the 29-year-old defendant had previously been convicted of resisting arrest, resisting a stop, evading arrest, driving under the influence, driving without a license (three times), violation of the implied consent law, and theft.

(a) Sentence Length

The trial court enhanced all convictions by finding that the defendant had a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range (factor (1)), *see* Tenn. Code Ann. § 40-35-114(1) (Supp. 2005), and that the defendant abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or the fulfillment of the offenses (factor (15)), *see id.* § 40-35-114(15). The defendant challenges the use of enhancement factor (15).

(1) Enhancement factor (15)

The trial court found that, based upon the defendant's employment at Calhoun's, "[h]e knew where the money was, who was [going to] be there, what time to perpetrate the offense and used that information and skill to attempt to accomplish the robbery[,] . . . the especially aggravated kidnapping, aggravated assault[,] and burglary."

Application of the private trust factor "is a task that must be undertaken on a case by case basis." *State v. Poole*, 945 S.W.2d 93, 96 (Tenn. 1997). The sentencing court is directed to examine "the nature of the relationship" and whether that relationship "promoted confidence, reliability, or faith." *State v. Kissinger*, 922 S.W.2d 482, 488 (Tenn. 1996). "If such a relationship or 'private trust' is shown, the State must then prove that the perpetrator abused that relationship in committing the crime." *State v. Gutierrez*, 5 S.W.3d 641, 646 (Tenn. 1999).

We conclude that factor (15) was properly applied in the present case. We have previously recognized that a relationship of private trust may exist between employer and employee. *See, e.g.*, *State v. Elizabeth M. Clark*, No. E2002-01592-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Knoxville, Dec. 1, 2003); *State v. Marsha L. McClellan*, No. E2000-02373-CCA-R3-CD, slip op. at 7-8 (Tenn. Crim. App., Knoxville, Apr. 19, 2001); *State v. Grissom*, 956 S.W.2d 514, 518 (Tenn. Crim. App. 1997). Although the factor is sometimes applied when the employer has entrusted the employee with company funds or books of account and the employee uses the position to steal funds, we believe that, even though the defendant was employed by Calhoun's as a line cook, the employer entrusted to him accessibility to facilities such as the employees' restroom and certain information, such as the closing procedure, the number and duties of the managers, the layout of the nonpublic areas of the restaurant, and the location of the office and the safe. We hold that the defendant's use of the facilities and the information available to him enabled his attempt to rob.

We recognize that this court has held that acts unrelated to the defendant's duties as a *public* employee were not proper bases for imposing a higher standard of conduct and thereby justifying a denial of pretrial diversion. *State v. James M. Lane, Jr.*, No. E1999-00615-CCA-R9-CD, slip op. at 5 (Tenn. Crim. App., Knoxville, June 1, 2000).[5] We also recognize that the defendant served as a line cook at Calhoun's and that the robbery attempt was unrelated *per se* to his duties as a cook. The criminal activities of the public employee in *James M. Lane, Jr.*, however, were essentially beyond the employer's proper aegis of control. Lane, who was a firefighter, was not "on the job" when he committed perjury in litigation with his wife. *Id.*, slip op. at 6. We believe that the employee's presence on the employer's premises or work site when the offense is committed may be a strong indicator of an abuse of trust, especially when the status as employee enabled or facilitated the offense. *See, e.g.*, *State v. William H. Bowen, Jr.*, No. 02C01-9409-CC-00199 (Tenn. Crim. App., Jackson, July 19, 1995) (diversion denied to correctional officer who breached public trust by smuggling drugs into prison in which he worked). In the present case, the robbery was attempted on the employer's premises when managerial and other personnel were present. In other words, we believe that the employer entrusted even its cook not to use his knowledge of procedures and an employees' restroom to linger about the premises after hours to effectuate an opportunity to rob. We hold that the trial court properly applied factor (15).

Furthermore, we are not hindered by the defendant's argument that Ms. Lucas, not Calhoun's, was the named victim of the attempted robbery and that no relationship of private trust existed between Ms. Lucas and the defendant. Factor (15) does not use the term "victim" and does not relate the abuse of trust to the offender's relationship with the named victim. The record clearly articulates that the restaurant, the safe, and the money inside were property of Calhoun's, the defendant's employer, and to reject factor (15) in this context would be to place form over substance.

(2) Mitigating factor (13)

Next, the defendant argues that the trial court failed to apply mitigating factor (13) as a means of recognizing the defendant's remorse. *See* Tenn. Code Ann. § 40-35-113(13) (2003) (providing that, if appropriate for the offense, the sentencing court may apply in mitigation of the sentence any factor consistent with the purpose of the sentencing law). The defendant relied upon the presentence report, where the following statement of his was presented:

> I would like to say to the victims and their families that I am sorry for the big mistake I made. I truly want to apologize. I wish the situation never would have happened. I can't believe the fact that I got into that situation. I can't take back what happened, I wish I could. I'm truly sorry. I'll be praying for the victims and praying for me to change. I want her to know that I never meant to hurt her.

[5] Because the *James M. Lane, Jr.* court was addressing pretrial diversion and not sentence length, that court did not analyze factor (15) per se but, rather, examined the general principle of abuse of a position of public trust.

Had the defendant testified in the sentencing hearing, the trial court would have been in a position to hear him and observe his demeanor, and typically, it would have been empowered to reject remorse as a mitigating factor upon finding that the defendant's statement was insincere or incredible. In the present case, however, the statement appeared in the presentence report, and no nuances of demeanor or inflection can be gleaned from the printed statement. On de novo review, we have the same opportunity to review the statement as had the trial court. Consequently, we opt to apply the factor, but we decline to afford the factor significant weight.

(b) Consecutive Sentencing

The defendant next challenges the trial court's use of consecutive sentencing to amass an effective sentence in excess of 60 years. The trial court based its consecutive alignment of several sentences upon its finding that the defendant was a "dangerous offender."

Consecutive sentencing may be imposed when the trial court determines that one or more of the criteria listed in Tennessee Code Annotated section 40-35-115(b) apply, and one criterion is that the defendant is a "dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." Tenn. Code Ann. § 40-35-115(b)(4) (2003). In *State v. Wilkerson*, 905 S.W.2d 933 (Tenn. 1995), the supreme court imposed two additional requirements for consecutive sentencing when the "dangerous offender" category is used: The court must find consecutive sentences are reasonably related to the severity of the offenses committed and are necessary to protect the public from further criminal conduct. *Id.* at 937-38.

On the facts of the present case, we conclude that the defendant's actions portray a dangerous offender and that the judicious use of consecutive sentencing would reasonably relate to the severity of the offenses and would be necessary to protect the public.

(c) Sentencing Conclusions

Because the convictions of especially aggravated kidnapping emanating from counts (1), (2), and (3) have been reversed and these charges dismissed, we do not address sentences for those convictions, except to comment that the sentences in those convictions were obviously used by the trial court to construct a lengthy effective sentence. That said, we believe that, despite the trial court's erroneous rejection of a slightly-weighed mitigating factor, the application of two enhancement factors justifies the court's use of maximum sentences, but in part because the sentence in count (4), the attempt to commit especially aggravated robbery, was less than the maximum and because of the disappearance of lengthier kidnapping sentences, we remand the case for re-sentencing and for a determination of consecutive or concurrent service of the sentences.

Before closing this opinion, we acknowledge that the defendant claims that his sentences were imposed in violation of his right to trial by jury. Because this issue has been decided

adversely to the defendant by our supreme court in *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005), the claim is unavailing.

_____

JAMES CUWOOD WITT, JR., JUDGE